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Article 7

The Law of Evidence in Wisconsin

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THE LAW OF EVIDENCE IN WISCONSIN

PART TWO

THE PREFERENTIAL RULES

I. Rule of preference for documentary originals.

1. The original documents must be produced unless not feasible so to do. In the following cases it is not feasible.

Estay Organ Co. vs. Lehman, 132 Wis. 144.

A. Loss—The loss of a documentary original is sufficient excuse for not producing it if a diligent and bona fide search has been made.

Perrin vs. State, 81 Wis. 135.

B. Destruction.

Bazelon vs. Lyon, 128 Wis. 337.

C. Opponent's Possession—If the opponent has *possession of the original,* and he *refuses* to produce it *on notice,* secondary evidence can be used.

Newell vs. Clapp, 97 Wis. 104.

But the opponent need not be given express notice before trial where there is implied notice, and the pleadings may be such.

Barton vs. Kane, 17 Wis. 37.

D. Third person's possession.

a. Possession of the original by a third person within the state is never sufficient excuse for not producing it, unless you try to get it and cannot. But you must have served such person with a subpoena ducus tecum.

Treveleven vs. N. Pacific Ry. Co., 89 Wis. 598.

b. Possession of the original by a third person out of the state to be sufficient excuse for not producing it, must show at least an asking for it.

Bruger vs. Princeton & St. Marie Mutual Insurance Co., 129 Wis. 281.

c. Official records may be evidenced at any time without producing the originals.

Section 4135 thru 4151a.

2. Limits to application of rule.
   A. In general, the original is the document which from the pleadings and law of the case is the first document in the case.
      a. As between a manuscript and printing, the pleadings and substantive law determine which is the original.
         Rex vs. Watson, 2 Starkie 116.
      b. As between a telegram received and sent; the received telegram is the original where the telegraph company is the agent of the sender. The sent telegram is the original where the telegraph company is the agent of the receiver.
         Saveland vs. Green, 40 Wis. 431.
      c. A carbon copy, though signed, is not a duplicate original.
         Menasha Woodenware Co. vs. Harmon, 128 Wis. 177.
3. If there are duplicate originals, any one may be used as original, and a copy can only be used after one accounts for all of the originals.
   Philipson vs. Chase, 2 Camp. 110.
4. The original need not be produced when one does not care to prove its contents.
   Cole vs. Gibson, 1 Ves. Sr. 503.
5. A party's extra judicial admissions of a writing's contents dispenses with producing it.
   Minnesota Debenture Co. vs. Johnson, 96 Minn. 91.

II. Rules preferring one sort of secondary evidence to another.
   A. Secondary evidence may be used where a railroad corporation refuses to produce originals.
      Section 4078c.
   B. Theoretically, one must use a copy of the record of conviction to impeach a witness, but one may also do this by asking him, and is not being concluded by his answer.
      Section 4073.

III. Rules of preference as between different kinds of witnesses.

A. Where it is impossible to call the attesting witnesses they are excused.

Section 3788.

Jones vs. Roberts, 96 Wis. 427.

B. A court stenographer's report is received in evidence only with the same effect as though he himself testified.

Section 4141.

HEARSAY RULE

I. The hearsay rule provides that no statement made out of court shall be received in evidence.

1. Modes of satisfying rules of cross-examination.

A. In all depositions notice must be given the opposite party within a certain time to attend the taking of the deposition.

Sections 4086, 4107, 4110.

2. Modes of satisfying rule of confrontation.

B. Certain circumstances permit depositions when confrontation is impractical.

Section 4101.

II. Exceptions to hearsay rule.

1. Dying declarations.

A dying declaration is admissible—

A. In criminal cases.

B. Where declarant's death is subject of the charge.

C. Where deposition covers circumstances of death.

D. It is not admissible to prove what happened before or after an unlawful act.

Montgomery vs. State, 20 Ind. 338.

2. Declarations of facts against interest.

A declaration of a fact against declarant's interest is admissible only where against a *pecuniary* or *proprietory* interest; but where against a penal interest it is not receivable.

Middleton vs. Melton, 10 B. & C. 317.

Exceptions: Sections 4079, 4080.

3. Statements of family history.

A statement of a fact of family history is admissible where the *declarant is a member of the family* in which this event took place.

Dodge vs. State, 100 Wis. 294.

Exception: Section 4160.

4. Regular entries.

A. A party's account book is admissible.

a. If it contains original entries.

b. If in his handwriting.

Section 4186.

Young vs. Miles, 20 Wis. 615.

B. Third person's entries are admissible only—

a. If he is deceased or out of the jurisdiction.

b. The entry is a regular entry in course of business.

Herman vs. Mason, 37 Wis. 273.

Unless items are each under five dollars.

Section 4187.

Note also Section 4188.

PRACTICE—To get around the statutory restriction, the clerk is left to testify and use the book to refresh his recollection.

5. Reputation.

a. Neighborhood reputation or rumor is not, as a general rule, admissible to prove any fact. But it may be received to prove marriage as essential to proof of living together.

McGoon vs. Irvin, 1 Pin. 526.

b. Field notes of a former survey, other than by the government, are mere hearsay as to the boundaries of such lands.

Lalles vs. Worth, 91 Wis. 406.

Copies: Sections 4151, 4151a.

7. Official statements.

A. Registers and records.

a. Any official statement made in course of official duties is admissible.

(I) It is within the course of official duties—

(1) When made express official duty by statute.

Court records and copies, Section 4140.
Reporter's notes, Section 4141.
Justice's docket, Section 4142.
Also Sections 4152 to 4162.

(2) Where implied official duty from nature of office.

B. Reports and returns.

a. Any official statement made in the course of official duties is admissible.

Watkins vs. Page, 2 Wis. 92.

(I) It is within official duty when made so by statute.

Sections 4148 to 4151a.

(II) An official return duty is never implied.

EXCEPTIONS: (1) Sheriff's return.
(2) Surveyor's return.

Ellicott vs. Pearl, 10 Pet. 412 (U.S.)

C. Certificates.

a. An official statement made in the course of official duties is admissible if—

(I) Made express official duty by statute.

Sections 4163 to 4173a.

(II) But no officer has impiled authority to give a certificate.

EXCEPTION: (1) Notary.
Wigmore's "A Treatise on Evidence," (1905, Vol. III, § 1676).

NOTE these definitions when reading statutes:

1. Exemplified copy—A copy under seal of court.
2. Certified copy—A copy by clerk of court.
3. Sworn copy—A copy testified to by a witness to it.

8. Statements of mental or physical condition.

A. A person's statement of bodily pain and suffering is admissible on condition that his statement tells of the present physical pain and suffering, and must not relate to outward circumstances that led up to the pain and suffering.

Rideout vs. Winnebago Traction Co., 123 Wis. 297. Note Section 4079m.

B. A person's declaration of a state of mind is admissible when it relates to an *existing* state of mind.

Doedem Shalleroso vs. Palmer, 16 Q. B. 742.

9. Spontaneous exclamations.

"What one says immediately on receiving the hurt, and before she had time to devise or contrive anything for her own advantage, might be given in evidence."

U. S. vs. Percheman, 7 Pet. 51 (U.S.).

III. Hearsay rule not applicable (Res gestae).

1. Where a substantive litigated fact is the speech of a person, one who heard the utterance can testify to it.

Sorenson vs. Dundas, 42 Wis. 642.

A. But what one says while suffering from an alleged assault is not admissible.

Price vs. Grzyll, 133 Wis. 623.

B. Claiming continuous possession of land while in possession is admissible.

Griswold vs. Nichols, 126 Wis. 401.

THE PROTECTIVE RULES

I. Oath. Fear of punishment for perjury is sufficient to qualify a witness to take an oath.

Section 4081.

II. Sequestration of witnesses.

III. Discovery before trial.

1. Witnesses.

A. Criminal case.

An accused is guaranteed by our constitution the right to "demand the nature and cause of the accusation against him," and "to have compulsory process."
Wis. Const., Art. 1, Sec. 7.

B. Civil cases.

Discovery liberally allowed.
Section 4096.

THE SYNTHETIC RULES

I. Number of witnesses required.

1. In treason two witnesses required.
Wis. Const., Art. 1, Sec. 10.

II. Kinds of witnesses required.

1. In treason two witnesses to the same overt act.
Wis. Const., Art. 1, Sec. 10.

III. Verbal completeness.

1. If it is desired to introduce a passage forming part of an entire conversation, any part may be introduced.

2. If it is desired to introduce a printed speech, the whole must be introduced.

3. But where a part only has been introduced, the opponent, as part of his case, may introduce the remainder as far as relevant to the case.

IV. Authentication.—A document may be authenticated by—

1. Age.

2. Contents.

Showing a reply to telegram or letter; but telephone calls have not been decided in Wisconsin.

3. Official custody.

4. Seal.

A. To authenticate a judicial record or copy from outside the nation, it must be attested by officer of court having charge of records, and under seal of court.

Sections 4140, 4145, 46, 47.

B. To authenticate a judicial record or copy from within the state, if produced from legal custodian, etc.

Section 4140.

C. To authenticate a judicial record or copy from another state, follow—

a. Federal Statute, or

(Rev. St., 1878, § 905, St. 1790, May 26.)

b. Wisconsin Statutes.

Section 4136.

THE EXTRINSIC RULES

I. Rules of absolute exclusion.

Formerly, if evidence was secured wrongly, it was not admissible, but this is no longer the rule.

II. Privileges.

1. Viatorial privilege.

A. In civil cases you must tender a witness travel fees and one day's expenses, unless state serves subpoena.

Sections 4058-9.

B. In criminal cases court may compel attendance of witness for defendant without tender if an indigent prisoner.

Section 4062.

C. There are few excuses for staying away, and dire results.

Sections 4063 to 4066.

D. An expert witness can only demand the same fee as any other witness, but a non-resident witness is entitled to more.

Section 4061.

2. Privilege for party opponent in civil cases.

A. One is not disqualified as a witness by interest, unless opposite party is deceased or insane.

Sections 4068, 9, 70.

B. A railroad company may be compelled to let opponents examine books.

Sections 4078b, 4078c.

3. Privilege for anti-marital facts.

A. A husband or wife is a competent witness against each other, with common-law exceptions.

Section 4072, as revised in 1917.

4. Privilege for self-incriminating facts.

A. The privilege against self-incrimination includes facts which tend to incriminate.

Aaron Burr's Trial, Robertson's Rep. I, 208, 244.

B. The privilege does not protect against disclosure of a fact identifying the person before a charge is made.

Ex parte Kneidler, 243 Mo. 632.

C. Corporations have this privilege limited.

Sections 4078a, b, c.

D. Claim of privilege.

a. An accused need not testify, and this raises no presumption.

Section 4071.

E. Waiver of privilege.

But if an excused party waives the privilege and testifies for himself, he may be cross-examined as an ordinary witness as to facts connecting him with the alleged crime.

Fitzpatrick vs. U. S., 178 U. S. 304.

F. Removal of privilege by grant of immunity.

a. In order to remove the privilege the immunity must be as broad as the privilege it takes away.
Coanselman vs. Hitchcock, 142 U. S. 547.

b. If a witness testifies in denial of any criminality, and an immunity statute is applicable, he does not obtain the immunity.
State vs. Murphy, 128 Wis. 202.

G. Policy of the privilege.
The Wisconsin bar in 1910 advised that the privilege be abolished.
Report of Committee on Trial Procedure, 1910.

III. Privileged relations.

1. Attorney and client.

A. Communications privileged.
Section 4076.

B. The communication is protected to anyone in the attorney's office whose intervention is necessary to secure and facilitate the communication between attorney and client.
Barnes vs. Harris, 7 Cush. 576.

a. A communication to an attorney acting as conveyancer in drawing a will is not privileged.

b. But if legal matters are discussed, they are privileged.

c. If the attorney acts as attesting witness, the heir may waive the privilege.
Mercer vs. State, 40 Fla. 216.

NOTE—Avoid N. Y. decisions on this subject, as they have a peculiar statute.

2. Husband and wife. (Section 4072.)

3. Official secrets.
Records are official secrets and need not be produced in court.

4. Physician and patient. (Section 4075.)

CONCLUSION

This completes the so-called protecting rules of evidence. The theory of admissibility, the presentation of evidence, presumptions, and so-called parol evidence rules belong rather to the study of procedure, and involve many interesting questions of theory and practice.

These rules I have also collected, and would be glad to send copies to any of the Marquette Law Review readers on application.

It is only just that I call attention to an error in the article in last month's Review which has been called to my attention. Point VII, 5, second rule, under the eliminative rules, should be corrected to read:

> "Under the Federal Rule a confession made to a police officer may be shown to prove that it was secured by threat or favor."
>
> *Brass vs. U. S.*, 168 U. S. 532.

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